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No. _____

IN THE

Supreme Court of the United States

October Term, 1984

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,
-vs-
EARNEST EARLY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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QUESTION PRESENTED

I.

WHETHER, AFTER A VALID FELONY ARREST, A POLICE OFFICER, FOR HIS OWN SAFETY, MAY OPEN THE DOOR OF RESPONDENT'S VEHICLE TO DETERMINE IF A COHORT IS HIDING IN THE VEHICLE?

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STATUTORY AUTHORITY:

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MCL 750.227; MSA 28.424 2

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PEOPLE OF THE STATE OF MICHIGAN,
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-vs-
EARNEST EARLY,
Respondent.

—◇—

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

—◇—

CITATIONS TO OPINIONS BELOW

The decision of the Michigan Supreme Court denying leave to appeal was filed on February 27, 1985, and is reported at __ Mich __; __ NW2d __ (1985). Petitioner had sought leave to appeal from a decision of the Michigan Court of Appeals. (*People* v *Early*, __ Mich App __ (Docket No. 74212, rel'd 12/7/84, unpublished)) The Michigan Court of Appeals' opinion had affirmed an unpublished opinion of the trial court, the Oakland County, Michigan, Circuit Court. Copies of all these opinions are included in the Appendix to this Petition.

JURISDICTION

The date of the order of the Michigan Supreme Court is February 27, 1985. The jurisdiction of this Court is invoked pursuant to 28 USC 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision which this Petition involves is:

Constitution of the United States, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Respondent, Earnest Early, was charged with carrying a .38 caliber pistol in a vehicle, contrary to MCL 750.227; MSA 28.424. Respondent had a preliminary examination in the 51st District Court for the County of Oakland, State of Michigan. At the conclusion of the examination, Respondent was bound over to the Oakland County Circuit Court, State of Michigan, to stand trial. Prior to trial, Respondent brought a motion to suppress the pistol, arguing that it was found as a result of an illegal search that violated the Fourth Amendment of the United States Constitution. The Oakland County Circuit Court trial judge ordered an evidentiary hearing. The hearing was held on May 5, 1983.

At the hearing, Petitioner called undercover police officer Peters to the stand. Officer Peters explained that the Pontiac City Police, Michigan State Police, and the FBI were working on an auto theft conspiracy ring. (E-3)† As part of the undercover operation, the police had made arrangements to sell $100,000 worth of allegedly stolen auto parts to an individual named Ira Flashner. Flashner was to give an undercover officer $100,000 and the officer would then give Flashner the key to a storage vault where the "stolen" parts were kept. (E-4)

On the day of the transaction, Flashner arrived at the prearranged site in Waterford Township, Michigan, with Respondent. (E-4) Respondent's pickup truck had first been placed under surveillance that day in Southfield, Michigan, several miles away. Officer Peters had followed Respondent's truck to the site in Waterford. Officer Peters could not see how many people were in the truck. (E-5)

After the money was exchanged, Flashner got into his vehicle and Respondent returned to his pickup truck. Respondent's truck was a four-wheel drive vehicle with "monster mudder" tires. The driver's side window was approximately five feet off the ground. (E-7)

Respondent's truck was then followed directly to the storage vault area. Respondent and Flashner were carrying parts from the vault when they were arrested by other officers. (E-6, 7) The validity of the arrest is not questioned. Officer Peters approached Respondent's truck. He did not know if there were other people in the truck. Peters stated, "I was concerned about my safety and the safety of the other officers at the scene." (E-7) The officer was asked "So just looking into the truck,

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† Pages designated "E-__" refer to the printed hearing transcript, attached hereto as Appendix E.

you would not be able to see if there was anyone crouched down in the truck?" Officer Peters said, "No, sir, it would be difficult." (E-7) The officer stated, "The vehicle could contain subjects inside that could conceivably have weapons." (E-7) With his gun drawn, Officer Peters opened the door of the truck. Under the driver's seat, he saw the handgun. It was not necessary for Officer Peters to move anything in the truck to see the gun. (E-8)

The Oakland County Circuit Court judge took the matter under advisement and subsequently issued an opinion suppressing the gun.[1] The trial court ruled that the officer did not have "probable cause" to enter the vehicle. On August 11, 1983, pursuant to Respondent's motion, the case was dismissed.

---

[1] The trial court's opinion stated, "The officer testified that he could have looked into the vehicle without opening the door to see if there were others within." (P.E., 27-28) This language was cited in the Court of Appeals' opinion. The "P.E." refers to the preliminary examination transcript which the trial judge obviously read, even though it was not before her as part of the record and she had conducted her own evidentiary hearing. More important is the fact that the trial judge's statement is misleading. On direct examination the officer was asked, "Sir, had you been in the proper position, would you have been able to observe the butt of the handgun without opening the door of the truck." The officer responded, "It's possible, but it would be a contorted position." (P.E., 16) Later, on cross-examination, the officer was asked, "It's a fact, is it not, you could have looked into the vehicle without opening the door to see if there was a human being in there?" Officer Peters responded, "It's — yes." (P.E., 27-28) The district court, in binding Respondent over for trial, stated:

> In this particular situation, the Court is convinced that the officer, being confronted with this rather high vehicle, made a proper decision in opening that door without first standing up where he could look into it to determine whether or not there was in this instance another individual which would pose a threat to himself or other persons involved in this particular investigation or arrest.
>
> Based upon that, premised upon that finding, the Court will admit the exhibit into evidence. (P.E., 30-31)

Petitioner appealed to the Michigan Court of Appeals. In an unpublished written opinion, the Court of Appeals affirmed the Oakland County Circuit Court's suppression of evidence and dismissal of this case. *People* v *Early*, __ Mich App __ (Docket No. 74212, rel'd 12/7/84, unpublished). Petitioner filed an application for leave to appeal to the Michigan Supreme Court. The application was denied by order of February 27, 1985.

REASONS FOR GRANTING THE WRIT

The Fourth Amendment requires, in general, that the police obtain a warrant prior to making a search. However, on occasion the exigencies of the situation may allow the police to conduct a search without a warrant. *Johnson* v *United States*, 333 US 10; 68 S Ct 367; 92 L Ed 436 (1947). The Michigan Courts completely ignored the exigencies of the situation involved in the instant case. The Michigan Courts did not consider the danger to the police officer in the form of a cohort hidden in Respondent's vehicle. Nor did the Michigan Courts properly apply the holding in this Court's recent decision of *New York* v *Belton*, 453 US 454; 101 S Ct 788; 17 L Ed 2d 768 (1981). In fact, the Michigan Court of Appeals' misconstruction of *Belton* has turned its holding completely around. The Michigan Court of Appeals interpreted *Belton* to require a detailed case-by-case factual analysis. This type of analysis is impossible for police officers on the scene to do with any degree of accuracy or correctness. *Belton* alleviated this problem. The Michigan Courts, by misconstruing *Belton*, have resurrected the problem. For these reasons, Petitioner respectfully submits that the Petition for Writ of Certiorari should be granted.

A.

In the instant case, it was imperative for the safety of the officers that Respondent's vehicle be quickly checked to see if any armed cohorts were hiding within the vehicle. A large illegal cash transaction had just previously taken place ($100,000). It was not unreasonable for the police to suspect that Respondent might have a hidden cohort in the vehicle.[2] This Court in *Terry* v *Ohio*, 392 US 1, 19; 88 S Ct 1868, 1870; 20 L Ed 2d 889 (1968), stated, "the scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Also see, *Chimel* v *California*, 395 US 752, 762; 89 S Ct 2034, 2039; 23 L Ed 2d 685 (1969). In this case, the limited intrusion involved only the opening of a vehicle door; presumably an act done in public view by Respondent on frequent occasions. The limited intrusion was strictly justified by the object of the intrusion which was the protection of the police officers. Once the door was open, it is uncontested that the loaded weapon was in plain view.

The Michigan Court of Appeals' ruling that probable cause was required before the police could open the vehicle door completely ignores the exigencies of the situation. A probable cause analysis is irrelevant. The Michigan Courts have ignored the fact that the Fourth Amendment allows limited searches or intrusions for the safety of the officers.

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[2] The Michigan Court of Appeals adopted the trial court's view that there was no "probable cause to believe other individuals were in Defendant's vehicle." Appendix B, B-3. The police need not have probable cause. The police acted only in a limited way for their protection. A probable cause analysis is irrelevant.

B.

The Michigan Court of Appeals' ruling also erroneously distinguished the instant case from *New York* v *Belton, supra*. The Court of Appeals stated:

> Here, unlike the case in *Belton*, the defendant was not an occupant of the vehicle when confronted by the police. Further, the defendant and the area were under the control of apparently eight policemen when the arrest was made. In addition, the defendant was 15 feet from the truck when the arrest occurred. We do not believe that under these circumstances, the search of defendants can be justified as a search incident to an arrest under *Belton*.

Petitioner submits that this is exactly the type of analytical process disapproved of in *New York* v *Belton, supra*. *Belton* sought to eliminate the multi-faceted subtle approach that was virtually impossible for police officers in the field to apply properly. "When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *Belton, supra* at 459-460; S Ct 2864. This Court therefore held "that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Belton, supra*, 460; S Ct 2864.

In the instant case, the police arrested Respondent, the recent occupant of a vehicle, 15 feet from his vehicle. Pursuant to *Belton*, the police properly searched the vehicle incident to Respondent's arrest. The Michigan Court of Appeals' decision to the contrary is erroneous and completely misconstrues *New York* v *Belton, supra*.

Petitioner respectfully submits that the Writ should be granted.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant this petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Michigan.

Respectfully submitted,

By: /s/ L. BROOKS PATTERSON
PROSECUTING ATTORNEY
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DATED: March 27, 1985

APPENDICES

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APPENDIX A

ORDER

(State of Michigan — Supreme Court)

(Dated February 27, 1985)

(People Of The State Of Michigan, Plaintiff-Appellant, v Earnest Riley, Defendant-Appellee — SC: 75622; COA: 74212; LC: 83-57280-FY)

At A Session Of The Supreme Court Of The State Of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 27th day of February in the year of our Lord one thousand nine hundred and eighty-five.

Present the Honorable: G. Mennen Williams, Chief Justice; Charles L. Levin, James L. Ryan, James H. Brickley, Michael F. Cavanagh, Patricia J. Boyle, Dorothy Comstock Riley, Associate Justices.

On order of the Court, the application for leave to appeal is considered, and it is Denied, because the Court is not persuaded that the question presented should be reviewed by this Court.

(*Certification Omitted*)

APPENDIX B

OPINION

(State of Michigan — Court of Appeals)

(Dated December 7, 1984)

(The People Of The State Of Michigan, Plaintiff-Appellant, v Earnest Early, Defendant-Appellee — No. 74212)

Before: R. B. Burns, P. J.,
and D. E. Holbrook, Jr. and Gribbs, JJ.

Per Curiam

The prosecutor appeals a circuit court order suppressing a handgun as evidence. We affirm.

The facts of this case are adequately described in the circuit court's opinion, as follows:

> "This matter comes before the Court on Defendant's Motion to suppress evidence. Defendant contends that a gun the police found in his pick-up truck was found as a result of an illegal search.
>
> "On August 5, 1981, Pontiac Police Office[r] Peters began a surveillance.[1]. Officer Peters followed as Defendant drove his vehicle from the Southfield Ramada Inn to a Waterford restaurant and from the restaurant to the Waterford Attic Storage Vaults. At the storage facility, Defendant was placed under arrest.
>
> "Defendant was arrested approximately fifteen feet from his vehicle. After defendant's arrest,

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[1] The surveillance of defendant was part of an investigation of an automobile-theft conspiracy. The police had arranged to sell stolen automobile parts to a cohort of defendant.

> Officer Peters approached Defendant's vehicle for the sole purpose of searching for other 'responsibles'. The officer opened the driver's door, observed the butt of a handgun protruding from under the front seat, and seized the weapon. Defendant was charged with carrying a concealed weapon in violation of MCLA 750.227[2]."

In ruling that the suppression motion should be granted, the trial judge reasoned as follows:

> "[The] [p]rosecution contends that there was no search here; rather, the weapon was seized under the 'plain view' exception. In order to invoke this doctrine, it must be shown the officer was in a place where he had a right to be. *People* v *Walker*, [385 Mich 565; 189 NW2d 421 (1971)]. The officer's sole reason for entering the vehicle was to look for other individuals. The officer testified that he could have looked into the vehicle without opening the door to see if there were others within. (P.E.* 27-28) The officer had followed Defendant for a considerable amount of time — from a hotel to a restaurant to a storage facility. This Court is not persuaded that there was probable cause to believe other individuals were in Defendant's vehicle. The officer not having a right to enter the vehicle for the stated reason, the 'plain view' exception does not apply.
>
> "Nor can it be argued that Defendant's vehicle was search [sic] incident to a valid arrest. A warrantless search is permissible in connection with a valid arrest, but only as to the area within the arrestee's immediate control. [*People* v *Gaskill*, 107 Mich App 304; 309 NW2d 245 (1981)]. The weapon

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[2] MSA 28.424.

> found here was not within Defendant's immediate control. Defendant was under arrest and fifteen feet from his vehicle when the gun was discovered.
>
> "Nor were there other 'exigent circumstances' sufficient to justify this warrantless search. Defendant was under arrest and unable to reach the weapon or destroy evidence or drive away the vehicle before a warrant could be obtained. *Gaskill, supra,* at 313. Nor has this Court found that the officer had probable cause to believe other individuals were present in Defendant's vehicle."

We agree with the circuit judge and add that the present case is factually distinguishable from *New York* v *Belton,* 453 US 454; 101 S Ct 788; 17 L Ed 2d 768 (1981), upon which the prosecution relies. In *Belton:*

> "the 'search was conducted by a lone peace officer who was in the process of arresting four unknown individuals whom he had stopped in a speeding car owned by none of them and apparently containing an uncertain quantity of a controlled substance. The suspects were standing by the side of the car as the officer gave it a quick check to confirm his suspicions before attempting to transport them to police headquarters . . .' Id., at 454, 407 NE2d at 424." 453 US 457.

Here, unlike the case in *Belton,* the defendant was not an occupant of the vehicle when confronted by the police. Further, the defendant and the area were under the control of apparently eight policemen when the arrest was made. In addition, the defendant was 15 feet from the truck when the arrest occurred. We do not

believe that under these circumstances, the search of defendants can be justified as a search incident to an arrest under *Belton*.

Affirmed.

/s/ Robert B. Burns
/s/ Donald E. Holbrook, Jr.
/s/ Roman S. Gribbs

APPENDIX C

OPINION

(State of Michigan – Circuit Court – County of Oakland)

(Dated May 13, 1983)

(People Of The State Of Michigan, vs. Earnest Early, Defendant — No. 83-57280-FY)

This matter comes before the Court on Defendant's Motion to suppress evidence. Defendant contends that a gun the police found in his pick-up truck was found as a result of an illegal search.

On August 5, 1981, Pontiac Police Officer Peters began a surveillance. Officer Peters followed as Defendant drove his vehicle from the Southfield Ramada Inn to a Waterford restaurant and from the restaurant to the Waterford Attic Storage Vaults. At the storage facility, Defendant was placed under arrest.

Defendant was arrested approximately fifteen feet from his vehicle. After Defendant's arrest, Officer Peters approached Defendant's vehicle for the sole purpose of searching for other "responsibles". The officer opened the driver's door, observed the butt of a handgun protruding from under the front seat, and seized the weapon. Defendant was charged with carrying a concealed weapon in violation of MCLA 750.227.

In order to conduct a search without a warrant, the government has the burden to show that the search falls within a recognized exception to the warrant requirement. *People* v *Gaskill*, 107 Mich App 304 (1981).

Prosecution contends that there was no search here; rather, the weapon was seized under the "plain view" exception. In order to invoke this doctrine, it must be

shown the officer was in a place where he had a right to be. *People* v *Walker*, 335 Mich 565 (1971). The officer's sole reason for entering the vehicle was to look for other individuals. The officer testified that he could have looked into the vehicle without opening the door to see if there were others within. (P.E.* 27-28) The officer had followed Defendant for a considerable amount of time — from a hotel to a restaurant to a storage facility. This Court is not persuaded that there was probable cause to believe other individuals were in Defendant's vehicle. The officer not having a right to enter the vehicle for the stated reason, the "plain view" exception does not apply.

Nor can it be argued that Defendant's vehicle was search [*sic*] incident to a valid arrest. A warrantless search is permissible in connection with a valid arrest, but only as to the area within the arrestee's immediate control. *Gaskill, supra,* at 312. The weapon found here was not within Defendant's immediate control. Defendant was under arrest and fifteen feet from his vehicle when the gun was discovered.

Nor were there other "exigent circumstances" sufficient to justify this warrantless search. Defendant was under arrest and unable to reach the weapon or destroy evidence or drive away the vehicle before a warrant could be obtained. *Gaskill, supra,* at 313. Nor has this Court found that the officer had probable cause to believe other individuals were present in Defendant's vehicle.

This being an illegal search and seizure, Defendant's Motion to suppress the gun as evidence is Granted.

It Is So Ordered.

Dated: May 13, 1983 /s/ Alice L. Gilbert, Circuit Judge

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* P.E. refers to February 10, 1983 Preliminary Examination transcript.

APPENDIX D

ORDER OF DISMISSAL

(State of Michigan – Circuit Court – County of Oakland)

(Filed August 11, 1983)

(People Of The State Of Michigan, Plaintiff, -vs- Earnest Early, Defendant — CR 83-57280-FY)

At a session of said Court, held in the Courthouse, in the City of Pontiac, County of Oakland, State of Michigan, on Aug. 11, 1983.

Present: Honorable Alice L. Gilbert, Circuit Judge

This matter having come before the Court on Defendant's motion; and the Court having been advised in the premises:

It Is Hereby Ordered that the above-captioned cause be and the same is hereby Dismissed for the reasons stated on the record of May 20, 1983.

/s/ Alice L. Gilbert,
Circuit Judge

Approved as to form:

/s/ Sanford Rosenthal
Attorney for Defendant

(*Certification Omitted*)

APPENDIX E

TRANSCRIPT OF EVIDENTIARY HEARING

(State of Michigan – Circuit Court – County of Oakland)

(Dated May 5, 1983)

(People Of The State Of Michigan, Plaintiff, vs. Earnest Early, Defendant — CR 83-057280 FY)

Proceedings had in the above-entitled cause before the Honorable Alice L. Gilbert, Judge of the Sixth Judicial Circuit of the State of Michigan, 1200 North Telegraph Road, Pontiac, Michigan 48053, on Thursday, May 5, 1983.

Appearances:
Gary L. Tunis (P30352), On Behalf of the Plaintiff;
Sanford Rosenthal (P19649), On Behalf of the Defendant.

* * *

(3) Mr. Tunis: Calling the case of People vs. Earnest Early, Case Number 83-57280 FY.

Gary Tunis appearing for the People.

Mr. Rosenthal: Sanford Rosenthal for the Defendant, Mr. Early.

Mr. Tunis: This is the date set for Evidentiary Hearing on the Defendant's Motion to Supress.

The Court: Is this the Defendant in court with you?

Mr. Rosenthal: Yes, Your Honor.

The Court: It is your Motion?

Mr. Rosenthal: No, Your Honor, it is the Prosecution's Motion.

I have a Motion to Supress and a Motion to Quash, but it was the Prosecutor that asked for the Evidentiary Hearing.

Mr. Tunis: It doesn't make any difference whether we call the witnesses, however, it is the Defendant's Motion to Suppress.

The Court: You have a right to a hearing. Do you want to have a hearing? Do you want to offer any evidence at the hearing?

Mr. Rosenthal: Yes. Well, I was under the impression that the Prosecution would move (4) forward. It is his Motion.

The Court: It is his Motion?

Mr. Rosenthal: Yes, Your Honor.

The Court: It is your Motion to Suppress?

Mr. Tunis: No, Your Honor. We are here for an Evidentiary Hearing because of *People* v. *Talley* which indicates when there is a Motion to Suppress Evidence, there must be an Evidentiary Hearing rather than relying on the transcript.

The Court: Will the People be introducing any evidence?

Mr. Tunis: If the Defendant does not call Officer Peters, we will call Officer Peters.

The Court: Then call Officer Peters.

KERMIT PETERS, having been first duly sworn by the Clerk of Court, was examined and testified as follows:

Direct Examination

By Mr. Tunis:

Q. Will you state your name for the record, please?

A. Kermit Peters, P-E-T-E-R-S.

Q. How are you employed?

A. Patrolman for the City of Pontiac.

(5) Q. Do you remember how you were employed on August 5, 1981?

A. Yes.

Q. How were you employed?

A. Member of the Pontiac Surveillance Unit working in conjunction with the Michigan State Police and FBI.

Q. What kind of case were you working on on that date?

A. Auto theft conspiracy ring.

Q. Can you explain a little background on the investigation of that case?

A. We had been working the investigation for approximately a year and a half prior to that where individuals were obtaining parts from the large auto company, General Motors, Ford, and would receive parts and then ship them around the country.

Q. Do you have any information as to the kind of people involved in these crimes?

A. Yes. There were individual names that we were surveilling and they had been under surveillance, different individuals, for some, up to over a year.

Q. Drawing your attention to the specific date of August 5, could you tell us what kind of investigation was planned on that date?

A. Yes. There was to be a transaction where an individual was to purchase parts, that he believed to be stolen, for $100,000.00.

(6) Q. Who was that individual?

A. Ira Flashner.

Q. Who was supposedly going to sell these items?

A. Undercover officer.

Q. Did you indicate with which department that undercover officer was from?

A. From Pontiac.

Q. Where was this transaction going to originate?

A. The transaction, the physical money transaction was in Waterford.

Q. Can you tell us how many officers were involved in that part of the transaction?

A. Approximately 10.

Q. Can you tell us now how it was set up?

A. Yes. Mr. Flashner was to meet the undercover officer at which time the money exchange was to take place. And the undercover officer gave Mr. Flashner a key to a locked storage area in Waterford.

Q. Were there any other persons going to be involved in that money transaction, to your knowledge, to be present?

A. If Mr. Flashner brought somebody to help convey — or to move the materials, yes, there would be other people.

Q. Approximately what time of day was this transaction supposed to start taking place?

A. After two in the afternoon.

(7) Q. Could you tell us how things worked out?

A. The transaction did go down. The undercover officer was given the money. The undercover officer gave Mr. Flashner the key. Mr. Flashner and his helper, who turned out to be Mr. Early, went to the vault storage area, began to remove parts from the storage area.

Q. Could we backtrack a little bit? You indicated Mr. Flashner had a partner. When did it become apparent he had a partner?

Mr. Rosenthal: I object. I think he should use the term helper.

Witness: We observed Mr. Early meet with Mr. Flashner.

Q. (By Mr. Tunis) When?

A. Two weeks prior to this transaction.

Q. Where had that meeting occurred?

A. That was at Rochester at a storage facility where they were unloading parts.

Q. Could you tell us what vehicle, if any, you saw Mr. Early driving?

A. It was a white or black Dodge with a white camper pickup.

Q. So at the time of the transaction, on August 5th, did you see that vehicle also?

A. Yes.

Q. When did you see that car or truck first?

(8) A. In Southfield at the motel located in Southfield at Twelve Mile and Telegraph.

Q. Who was in the truck?

A. In the truck was Mr. Early.

Q. Were you observing the truck?

A. Yes.

Q. Did you follow the truck?

A. Yes.

Q. Where did you follow it?

A. Ultimately arrived at the Pied Piper Restaurant in Waterford.

Q. How far were you from the truck when you were following it?

A. At varied distances.

Q. Could you see into the passenger compartment?

A. At times I could see into the vehicle, but not clearly.

Q. Can you tell for sure how many people were in the truck?

A. No, sir.

Q. So after you arrived, then, at the Waterford location, what happened then?

A. The transaction, money transaction went down.

Q. Could you tell us a little bit more who was getting out of the truck or the vehicles and how that came about?

A. Yes. Mr. Early got out of the truck. Mr. Flashner was operating, I believe, a red van, he got out of the red van.

(9) Q. Were there any other individuals involved in making the purchase from the undercover officers?

A. No, sir.

Q. Then you indicated that they went to another location?

A. Yes.

Q. Who drove the other vehicle?

A. Mr. Early got back into the pickup truck and Mr. Flashner drove the red van.

Q. And you followed?

A. Yes.

Q. What happened when you got to the location?

A. They arrived at the storage area at a certain locker number. There's other individuals observing their actions; converged on the individuals, Mr. Early and Mr. Flashner.

Q. Did Flashner and Early get out of their vehicle?

A. Yes, they did get out, the door was opened when I arrived.

Q. The doors of which vehicle was open?

A. The doors on the van were open, they were carrying parts out of the vault area.

Q. Could you see into the pickup at that time?

A. I could see the pickup, I didn't look into it at that time.

Q. You indicated — There had been a transaction; is that right?

A. Yes.

(10) Q. How much money was involved in the transaction?

A. $100,000.00.

Q. Who was giving the $100,000.00 to whom?

A. Mr. Flashner was giving the undercover officer $100,000.00.

Q. That had already been done?

A. Yes.

Q. Was the $100,000.00 at the location where the arrest took place?

A. It was in the control of the undercover officer who was at that scene, yes.

Q. Could you tell us just a little bit more about this pickup and how high up from the ground it was?

A. It was a four-wheel drive pickup with monster mudder tires on it. The driver's side window was approximately five feet above the ground.

Q. So just looking into the truck, you would not be able to see if there was anybody crouched down in the truck?

A. No, sir, it would be difficult.

Mr. Rosenthal: I think that's conclusionary.

Mr. Tunis: I think it's a conclusion he is able to make because he was there.

The Court: Go on.

Q. (By Mr. Tunis) What happened after all the officers started to converge to make the arrest?

(11) A. The pickup truck was parked north of the van. Mr. Early and Mr. Flashner were secured. I looked over the area and walked over to the pickup truck.

Q. When you say "secured," do you mean placed under arrest?

A. Yes.

Q. What was your reason for going over to the pickup truck?

A. I was concerned about my safety and the safety of other officers at the scene.

Q. What specifically gave you concern?

A. The vehicle could contain subjects inside that could conceivably have weapons.

Q. What did you do then when you approached that pickup truck?

A. I approached the pickup truck on the driver's side and I opened the driver's door.

Q. Did you have your gun drawn?

A. Yes.

Q. What happened when you looked inside?

A. I observed the butt of a handgun underneath the driver's seat wrapped up in a red rag.

Q. How much of the gun was — uh —

A. The butt was exposed and from around the cylinder area down was wrapped up in a red rag.

Q. Did you see anybody else in the pickup truck?

A. No.

Q. Did you have to move anything in order to see the butt of (12) that revolver?

A. No.

Q. Which side of the truck was it located on?

A. Underneath the driver's seat area.

Q. You would have had difficulty seeing into the pickup truck to see if there was anybody else in there without opening up the door?

A. Yes. And I feel I would have been exposing myself, in case there was somebody inside there, that they would see me at the same time I would see them.

Mr. Tunis: No further questions at this time.

Cross-Examination

By Mr. Rosenthal:

Q. Mr. Peters, the surveillance that was conducted the day of the incident in question, what time did you start that surveillance?

A. Approximately six in the morning.

Q. What time did you start surveilling Mr. Early?

A. As I recall, roughly, approximately noon or so.

Q. You saw him get out of the truck around noon?

A. Approximately.

Q. And the vehicle was in your view at that time?

A. Yes, sir.

Q. And you saw no one else in the truck at that time?

(13) A. No, sir.

Q. And the truck remained under surveillance; did it not, sir?

A. Yes, sir.

Q. I'm speaking now of the truck Mr. Early was in.

A. Yes, sir.

Q. Did it remain under surveillance until the time of the arrest; did it not?

A. Yes, sir.

Q. At no time did you see anybody else in that vehicle?

A. No, sir.

Q. You prepared an incident report; did you not, sir?

A. Yes, sir.

Mr. Rosenthal: Your Honor, there is an Exhibit A attached to my motion if the Court would like to —

Q. (By Mr. Rosenthal) According to your incident report, is it correct to say that you gave as a reason for opening the door and going to the vehicle that you were looking for other principles; is that right, sir?

A. I was concerned about the safety of myself and the other officers.

Q. I say according to the report, though.

The Court: Where are you referring to on the Exhibit? The dialogue?

(14) Witness: It states here, I could not tell if someone was hiding on the floor.

Q. (By Mr. Rosenthal) At this point, I opened the door, and et cetera; right?

A. Yes, sir.

Mr. Rosenthal: It's on Page 3, Your Honor.

The Court: I have got it.

Q. (By Mr. Rosenthal) All right. How tall are you, by the way?

A. 5' 11".

Q. So, you're 11 inches higher than the window would be; is that right?

A. Approximately, yes.

Q. Approximately.

Mr. Peters, we've heard alot of background said relative to why you were on this surveillance and so forth.

A. Yes, sir.

Q. By the prosecutor. Subsequent to the apprehension of Mr. Flashner and Mr. Early, did there come a time when Mr. Early was interviewed by both yourself and the members of the Federal Bureau of Investigation?

A. Yes, sir.

Q. And I was present, was I not, sir?

A. Yes, sir.

(15) Q. After the interviews relative to Mr. Early, was it not the conclusion of the Federal Bureau of Investigation and yourself that he was not involved in the conspiracy relative to the stolen auto parts?

Mr. Tunis: Objection, Your Honor, irrelevant.

Mr. Rosenthal: It's relevant. Your Honor, I would like to say why. I believe the Prosecutor took great pains to advise the Court about this extensive and large conspiracy. And I think that the Court ought to know all of the facts as the witness knows them and I think I have a right to bring that out.

Mr. Tunis: The question is what knowledge the officer had at the time of the arrest and search, not what he learned subsequent to that.

The Court: The Court sustains the objection.

Q. (By Mr. Rosenthal) There were approximately how many officers involved in this surveillance, sir?

A. For that particular date?

Q. Yes, I'm confining my questions to the particular day Mr. Early was arrested.

A. Approximately 10, sir.

Q. Did any of those officers report to you seeing anybody else in the truck besides Mr. Early?

(16) A. No, sir.

Q. Where was Mr. Early at the time that you looked into the vehicle?

A. He was by the van that was parked in front of the pickup truck, to the south of the pickup.

Q. How far, approximately, Mr. Peters?

A. Approximately eight feet or so. At least eight feet.

Q. Do you recall testifying at an examination relative to this case?

A. Yes, sir.

Q. Could you have said that it was 15 feet?

A. Yes, sir.

Q. Would that be accurate as you reflect on it?

A. If the transcript says it, yes, sir.

Mr. Rosenthal: With the Court's permission, I'd like to show this to the witness.

The Court: Yes.

Mr. Rosenthal: Your Honor, I'm showing Page 15 — I'm sorry, Page 12 of the transcript to Officer Peters.

Q. (By Mr. Rosenthal) Have you had a chance to peruse that?

A. Yes, sir.

Q. Does that refresh your recollection?

A. Yes, sir.

Q. Did you state 15 feet approximately?

(17) A. Yes, sir.

Q. So that would probably be more accurate than the eight feet you just stated?

A. Yes, sir.

Mr. Rosenthal: I have nothing further of this witness.

Mr. Tunis: No further questions, Your Honor.

The Court: You may step down.

Mr. Rosenthal: I have one question, if I may, Your Honor. I'm sorry.

Q. (By Mr. Rosenthal) Mr. Peters, did you get any fingerprints of the Defendant off the weapon in question?

A. No, sir.

Mr. Rosenthal: Thank you.

Mr. Tunis: No further questions, Your Honor.

The People would be presenting no further evidence for purposes of this hearing.

Mr. Rosenthal: Your Honor, I would call Mr. Early.

EARNEST EARLY, called as a witness on his own behalf, having been first duly sworn by the Clerk of Court, was examined and testified on his oath as follows:

(18) *Direct Examination*

By Mr. Rosenthal:

Q. What is your name, sir?

A. Earnest Early.

Q. How old are you, Mr. Early?

A. 49.

Q. When will you be 50?

A. The 9th of this month.

Q. Married, sir?

A. Yes, I am.

Q. And how many children do you have?

A. Seven.

Q. Mr. Early, do you own any businesses?

A. Yes, I do.

Q. What are the names of them and how many do you have?

A. I have got five.

Q. What are they?

A. Broadway Auto Electric, Broadway Motor Sales, and I've got a manufacturing — not manufacturing, but a rebuilding plant.

Q. What do you rebuild?

A. Transmissions.

Q. Anything else?

A. Yes, we have a clothing store also.

Q. Would you speak up so the Court can hear you and the (19) reporter.

(Whereupon, Defendant's Exhibits 1 and 2 were marked for identification)

Q. (By Mr. Rosenthal) Mr. Early, I'm going to show you Defendant's Exhibit Number 1 and ask if you can identify this, sir, if you know what it is.

A. Yes. A Dodge truck.

The Court: A what, sir?

Witness: Dodge truck.

Q. (By Mr. Rosenthal) Specifically, what is it? Obviously it is not a truck, it's a piece of paper. Do you know what this document is?

A. Yes, it's a Title.

Mr. Rosenthal: (Presenting document to Prosecuting attorney)

Q. (By Mr. Rosenthal) You have identified this as a Title to a Dodge truck?

A. Right.

Q. Is that the truck in question that you have heard testimony about from Officer Peters?

A. Yes, it was.

Q. How is that Titled, sir?

A. Broadway Motor Sales.

Mr. Rosenthal: Your Honor, I would (20) move the admission of Defendant's Exhibit Number 1.

Mr. Tunis: I don't see the relevance of that in regard to the purpose of this hearing which is to determine whether the search was legal.

The Court: Is this the Title to the vehicle in question?

Mr. Tunis: Yes, Your Honor.

The Court: For whatever probative value it may have, it certainly is admissible.

Mr. Rosenthal: Thank you, Your Honor.

Q. (By Mr. Rosenthal) Mr. Early, I will show you Defendant's proposed Exhibit 2 and ask you if you can identify that.

A. Yes. This is the Bill of Sale on the vehicle.

Mr. Rosenthal: Your Honor, I would move the admission of Exhibit Number 2 which is a Bill of Sale for the same vehicle.

Mr. Tunis: Same objection.

The Court: It's admitted.

Mr. Rosenthal: Thank you.

Q. (By Mr. Rosenthal) Mr. Early, the owner of the vehicle that you drove in question was Broadway Motor Sales; is that correct?

A. Right.

Q. And you are the owner of Broadway Motor sales; is that (21) correct?

A. Yes.

Q. How long have you had that vehicle in Broadway Motor Sales?

A. Oh, — well, — I would say a year or so.

Q. Are you the sole driver of that vehicle?

A. No, I am not.

Q. Who drives that vehicle?

A. Well, I have 27 employees and all of them drive it.

Q. At various times and so forth?

A. Yes.

Q. Mr. Early, you have heard testimony about your arrest and being with Mr. Flashner that day.

A. Yes.

Q. Were any charges ever brought against you by the United States Government?

A. No.

Q. Relative to the actions on that date or any other date, have you ever been charged by the United States Government with anything?

A. No.

Q. Do you know whether or not the United States Government went to the Oakland County Prosecutor's Office advising them you hadn't been charged?

Mr. Tunis: Objection, irrelevant, Your Honor.

(22) Witness: No, I don't.

Q. (By Mr. Rosenthal) Mr. Early, did you know there was a gun in that truck?

A. No, I didn't.

Q. Was the gun your gun that Officer Peters found?

A. No, I don't own that gun.

Q. Did you ever carry that weapon?

A. No.

Q. Was anybody else in that truck on the day that you were arrested?

A. Possibly, yes.

Q. Would this be before or after you drove it?

A. Before.

Q. I'm speaking of the period of time from when you drove the truck at your first meeting, was anybody in the truck with you when you drove?

A. Oh, no.

Q. That includes the stop in Southfield at the restaurant or motel; would it not?

A. No.

Q. At no time there was anyone with you?

A. No, no one.

Mr. Rosenthal: Your witness.

Mr. Tunis: We have no questions to ask him, Your Honor, in relation to this hearing.

(23) The Court: You may step down.

Mr. Rosenthal: Your Honor, does the Court want to hear the arguments on the motion now?

The Court: No other evidence to be offered?

Mr. Rosenthal: No, ma'am.

The Court: Certainly.

Mr. Rosenthal: Bear with me just one second, please.

Your Honor, as the Court will note, and I will try to make this brief as possible, having heard some of the matter in part that was covered at the examination, basically what we have alleged in our Motion and brief in support thereof is that there really was no valid reason for Mr. Peters to search the vehicle without obtaining a search warrant.

I have various cases cited in the brief, but the fact remains there was no exigency, no reason to believe the vehicle would be moved. There were approximately eight or ten officers of the law present and they did not obtain a search warrant. The question of whether or not he was looking for someone which Exhibit A shows he — it doesn't say anything about fear, Exhibit A being the incident or police report — was looking for individuals or other principals in the matter. We feel that there was no (24) foundation for the arrest — I mean for the search. You know, that being true, we feel it should be suppressed, because a search conducted without a warrant is unreasonable per se. The burden is on the government, according to *People* v. *Gaskill*, which cites the *Coolidge* v. *New Hampshire* case, to show an exception.

Now, if they wanted to search the vehicle, and not seeing anything, I would respectfully remind the Court this vehicle was under surveillance from the testimony we have elicited here and the best we can tell from the transcript at all times and no one was seen other than Mr. Early driving it. It's highly improbable that somebody was ducked down, as it were, in the vehicle next to the driver this whole period of time of surveillance which started early in the morning and concluded at, I

believe, 2:30 or thereabouts in the afternoon at the time of the arrest. Therefore, I believe that the idea of the search predicated on looking for someone, that the burden was on the officer to obtain a search warrant to search the vehicle. The vehicle was not in any jeopardy of being moved, there was no one who was going to destroy the evidence, there was no immediate danger to this officer or anyone else that he could actually foresee. In fact, as I understand it, there was no evidence found in the vehicle relative to stolen parts. However, it would have been incumbent upon (25) them to obtain a search warrant for that vehicle in my opinion.

The only exception I could think of is when it — the officers can search when it becomes circumstances make it impossible really for them to obtain a search which would not be the case. They had many officers and they secured him. This man, by the officer's testimony, was 15 feet, approximately, away from the vehicle. And there was not any showing that there was anyone in the vehicle even though it had been under surveillance, nor was anybody found. That's one case and there are more cases enumerated.

But, in addition to that, I would like to — And the reason I called Mr. Early was in accordance with the *Butler* case which is a very recent case, Your Honor. It's incumbent upon the — that's 413 Mich 377 — One of the elements of carrying a concealed weapon in a vehicle is carrying. By that, the Court said to "carry" would infer someone must carry it, as on their person, just being in the vehicle, the old notion of it just being in a vehicle is not sufficient. And there has been no testimony that he at any time carried a weapon. As a matter of fact, the only testimony comes from Mr. Early to the effect he did not know the weapon was there, it was not his weapon, and he never carried a weapon.

(26) The Court: I'm confused by your argument. The examining judge already found the elements of the crime were there and I thought this was just a hearing on the search.

Mr. Rosenthal: There are two things, Your Honor. I have filed these motions and Mr. Tunis did not file his answer to them and requested a hearing. It was actually a Prosecution's hearing. So, as long as we have a hearing, I would go forward with my witness.

But the examining magistrate, we did not cite *Butler* at the time. But there was no showing that the examination transcript, if read from cover to cover, that there's any way or anybody has ever placed this weapon as being carried by Mr. Early. The most that can be said is that the weapon was in the vehicle.

We have also shown from testimony the number of people that have driven that vehicle. We don't know who had it, who put it there. The only thing was it was found there according to the officer's testimony.

I have argued this in two stages, one relative to whether or not he had the right to search and, second, even if the Court found that he did, the examining magistrate erred in binding over. Because *Butler* is very clear about the word "carrying," meaning it must be carried by someone and that you cannot impute to carry.

(27) Therefore, based upon those things, I would ask the Court for either one or both of those reasons grant my Motion, first of all, to Suppress in the first instance and, as to argument two, to Quash because the elements have not been shown by the Prosecutor.

Mr. Tunis: Your Honor, We would like the opportunity to file a written brief now that we have the facts, however, we will make our argument before the Court at this time.

In regard to the first question of the search, we feel that the officer has shown his actions were reasonable in

that, first of all, there was a transaction that involved $100,000.00. That $100,000.00 was at the scene, therefore, it's not unknown for that amount of money the parties will try to take the other party, take advantage of them, take the money and the parts and get everything out of the transaction. If that was going to be the case here, then they would have somebody hiding, somebody that would not be visible to the other participants in the transaction. The best place for them to be would be in that pickup truck waiting for the other people to load up the parts and then take the money.

The officer has indicated that he would have to see at least five feet in order to see into the vehicle. Obviously it would not have been a good idea, if there was (28) somebody in the truck to stick his head up over the window and look, because he would have been putting himself in great jeopardy if that person had a gun. The person could have shot the officer. Therefore, it was reasonable for the officer to open the door, having his gun drawn ready to take action. He then saw the gun under the driver's side sticking out. We feel the search in itself, the search was reasonable.

In regards to the Motion to Quash, because of the testimony given to the magistrate was sufficient to show the elements of Carrying a Concealed Weapon and that the testimony given by the Defendant today was not before the magistrate. It would go to the question of fact as to whether the Defendant had knowledge of that gun being carried in the vehicle. Because the testimony at the exam indicated that the gun was found on the driver's side and, supposedly, the Defendant would have had his feet right in between or the gun would have been right in between the Defendant's feet that that is sufficient for purposes of the exam to show probable cause that the Defendant, who was eventually found to be the only occupant of the pickup truck, that

he had possession and was carrying the gun even though it was not on him or on his body personally.

The Court: And the owner of the (29) truck.

Mr. Tunis: And the owner of the truck.

Therefore, that testimony we feel shows that there was not an abuse of discretion by the magistrate in binding the case over.

As we indicated, we would like to file a written brief, also, now that we have heard the facts in the case.

The Court: You want to have an opportunity to respond to it I suppose.

Mr. Rosenthal: Yes.

The Court: Then I won't rule until you have had an opportunity to offer some law in support of your position.

Mr. Tunis: Thank you, Your Honor.

Mr. Rosenthal: Your Honor, just very briefly, and I know the Court has other matters, I would like to point out to the Court that this idea of the transaction of stolen property is always well done by the Prosecution, both at the exam and here. And yet when I raised the question of what the findings were at the investigation, I am always stopped from getting to that issue.

I think it's pure conjecture on Mr. Tunis' part to say that if someone was involved or even at the moment you (30) thought they were involved, I think the officer had the right at that time to feel Mr. Early may have been involved; that you would have somebody hiding to rip off the transaction, as it were, that's purely conjecture and there's nothing to show that that was about to take place or would have taken place. In fact, quite the contrary, in spite of the surveillance, nobody was ever seen in the vehicle.

The Court: I suppose officers, as attorneys, are supposed to anticipate things that might and hope that they don't.

Mr. Rosenthal: Maybe a law enforcement officer might at the time, but I doubt the Prosecutor of a motion —

The Court: Well, you will have an opportunity to respond.

If there's any need for further legal argument, the Court will notify you.

Mr. Rosenthal: Thank you.

(Whereupon, these proceedings were concluded.)

(Certificate of Reporter Omitted)

84-1576

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CLERK

No.

In the Supreme Court of the United States

October Term, 1984

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner

v.

EARNEST EARLY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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COUNTER-STATEMENT OF QUESTION PRESENTED

Petitioner's statement of the question presented incorrectly assumes the existence of facts which are contrary to the determination made by the trial court. The incorrectly assumed facts are whether the police officer opened the door "for his own safety" and whether such was done "to determine if a cohort is hiding in the vehicle". Further, such was not the question presented to the Michigan courts. The following counter-statement of the question is the one which was presented to the Michigan courts.

QUESTION I

WHETHER THE TRIAL COURT ERRED IN SUPPRESSING THE EVIDENCE IN THIS CASE?

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COUNTER-STATEMENT OF THE CASE

Petitioner's statement of the case is incomplete and inadequate because it completely ignores the testimony at the preliminary examination, and also because it incorrectly summarizes the testimony at the evidentiary hearing. Petitioner, however, correctly recites the procedures and rulings in the Michigan courts, and hence this counter-statement only concerns itself with the record testimony.

At the preliminary examination Kermit Peters, a Pontiac patrolman, testified that on August 5, 1981 (18 months earlier), he was assigned to a Pontiac suveillance unit working with the Michigan State Police and the FBI in connection with a 1½ year investigation of an auto theft conspiracy ring. (2a-3a) He began surveillance of one Ira Flashner at approximately 6:00 a.m. that day at the Ramada Inn, Southfield. Respondent arrived in his truck at 12:56 p.m. Respondent and Flashner were observed together, and both left, Respondent in the pickup truck, and Flashner in a red van. (3a-4a) They ultimately arrived at the Pied Piper Restaurant, Waterford, where Flashner was to pay $100,000 in cash to an undercover agent to purchase "stolen" auto parts. Respondent in his pickup truck followed the red van to the Pied Piper Restaurant parking area, where in Respondent's presence Flashner gave a suitcase full of money to an undercover officer. The parties left the restaurant, and went to Attic Storage Vault, Waterford, for the purpose of getting the parts involved in the transaction. When they entered onto the Attic Storage Vault premises a signal was given, the officers converged, and both Respondent and Flashner were arrested. Respondent had been under continuous observation by Officer Peters. Eight policemen were present. (4a-6a)

When Respondent was arrested he was approximately 15 feet from his pickup truck. Officer Peters went over to the pickup truck, opened the driver's door, and observed the butt of a handgun on the floor of the truck protruding from under the driver's seat. (6a-8a)

During the surveillance of the vehicles officer Peters had a view of one person in each vehicle. (10a) He stated that the reason he opened the door of the truck was to see if there were other people in it, and it was based on a concern for his safety and that of the other officers. (10a) Peters also observed Respondent stop at a coffee shop, and Respondent was the only individual in the truck at that time. (11a)

Officer Peters acknowledged he could have looked into the vehicle without opening the door to see if there were other humans in there. (12a)

At the evidentiary hearing held May 5, 1983, Officer Peters again testified along the lines of his testimony at the preliminary examination. He stated the investigation was of individuals obtaining parts from the large auto companies and shipping them around the country. (E 3) He stated that although he could see Respondent's truck, he could not tell how many people were in it. (E 5) He described Respondent's truck as a 4 wheel drive pickup with monster mudder tires on it, with the driver's side window approximately 5 feet from the ground, so that just looking into the truck you would not be able to see if there was anybody crouched down in it, although Peters was 5'11" tall. (E 7, E 10) He reiterated that after Respondent and Flashner were arrested Peters was concerned about the safety of officers, and that Respondent's "vehicle could contain subjects inside that could conceivably have weapons". (E 7) Peters affirmed that Respondent's truck had been under continuous surveillance from approximately 12:00 noon until after the arrest, and that at no time did officer Peters see anybody else in the truck. (E 9) Nor did any other officers report seeing anyone in the truck besides Respondent. (E 11)

Respondent also testified at the evidentiary hearing. He is the owner of Broadway Motor Sales in which name the truck was registered, and was not its sole driver. He had 27 employees. (E 12-14) He denied owning the gun, or knowing that it was in the truck. (E 15) He had never been charged by the United States. (E 14)

REASONS FOR NOT GRANTING THE WRIT

Introduction

Petitioner seeks to overturn the trial court's finding that a handgun was illegally seized and as a consequence should be suppressed.

> "The general rule under both the Michigan and United States Constitutions is that searches conducted without a warrant (without the prior approval of a judge or magistrate) are unreasonable. [citations omitted] Exceptions to the rule are narrowly and carefully drawn and the burden is on those seeking the exception to show the need for it." *People* v *Reed* 112 Mich App 693, 695, 317 NW2d 228 (1982).

In other words, to justify the warrantless search in the present case, Petitioner must clearly establish "that the exigencies of the situation made that course imperative". *Coolidge* v *New Hampshire*, 403 US 443, 445, 91 S Ct 2022, 29 L Ed 2d 564 (1971).

In order to reverse the trial court's decision to suppress the handgun on the basis that the warrantless search was unreasonable under the circumstances, the Petitioner must also meet the heavy burden of showing that the finding was "clearly erroneous". *People* v *Young*, 89 Mich App 753, 763, 282 NW2d 211 (1979) cert den 445 US 927; *People* v *Terrell*, 77 Mich App 676, 679, 259 NW2d 187 (1977).

Finally, special regard must be given to the trial court's opportunity to evaluate and judge the credibility of Officer Peters whose testimony was offered by Petitioner to justify the warrantless search. *People* v *Burrell*, 417 Mich 439, 448-449, 339 NW2d 403 (1983); *People* v *Westerfield*, 71 Mich App 618, 623, 248 NW2d 641 (1976).

In an effort to have the order suppressing the handgun overturned, Petitioner contends that the warrantless search and seizure should be upheld under either of 2 recognized exceptions. The first exception is the "plain view" doctrine, and the second is the "search incident to arrest" doctrine. Respondent submits that the facts and circumstances present at the time of the search as determined by the trial court do not form a sufficient basis for justifying this search under either of these exceptions. Consequently, the trial court was factually and legally correct, and cannot by any stretch of the legal imagination be said to have been "clearly erroneous".

(1) "Plain View"

Petitioner first seeks to justify the warrantless intrusion into Respondent's truck and seizure of the handgun under a somewhat distorted application of the "plain view" doctrine. There are several implicit limitations on this doctrine which Petitioner has not sufficiently addressed, and which preclude its application under instant facts and circumstances.

The foremost of these limitations is that "plain view *alone* is never enough to justify the warrantless seizure of evidence". *Coolidge* v *New Hampshire, supra,* 403 US, p 468 (emphasis in original).

> "For the plain view doctrine to apply officers must rightfully be in a position from which the evidence is visible, there must be a prior justification for the officers' intrusion and discovery of the evidence must be inadvertent." *People* v *Johnson,* 81 Mich App 70, 76, 264 NW2d 125 (1978).

In order to justify the initial intrusion, it must be established that there is probable cause for a belief that sufficient exigent circumstances exist to justify the warrantless search. As succinctly set forth in *People* v *Dugan,* 102 Mich App 497, 503, 302 NW2d 244 (1980), cert den 455 US 927;

> " * * * there is no need for a warrant if the police *also* have probable cause to believe that an immediate warrantless search is necessary to (1) protect the officers or others, (2) prevent the loss or destruction of evidence or (3) prevent the escape of the accused. [citations omitted] The rationale of the exception is clear; when the police have the probable cause necessary to secure a warrant, but circumstances make it impossible to obtain the warrant in time, then it is 'reasonable' under the Fourth Amendment to conduct a search and to seize evidence or contraband." (emphasis supplied)

Petitioner relies on the first of these enumerated exigent circumstances (protection of the officers) in an attempt to legitimize the warrantless search. Petitioner alleges that the truck was entered to ascertain whether there were any other occupants who might have presented a danger to the officers. *The trial court, however, factually determined that Petitioner did not establish probable cause* upon which to form a belief that there could be anyone in the truck.

This finding is not clearly erroneous. It is supported by the evidence, and is clearly demonstrated by review of the testimony of Officer Peters. At both the preliminary exam and the evidentiary hearing, Peters testified that on August 5, 1981, he had Respondent and his truck in constant surveillance from approximately 12:00 noon until the time of Respondent's arrest. Inasmuch as the "transaction" did not take place until after 2:00 in the afternoon, and inasmuch as Respondent was arrested even later, this surveillance clearly continued over a considerable length of time. In fact, Officer Peters stated that he observed Respondent exit from and get back into his truck on two occasions prior to the arrest, and that he again observed Respondent get out of the truck one final time at the storage facility where the arrest was made. Peters then testified that during this extended period of close observation and surveillance, he did not at any time observe anyone inside the truck other than Respondent. In fact, Peters positively stated that when Respondent got out of his truck at the coffee shop, Respondent was the only person in it.

As a result, the trial court was well justified in finding that there was no probable cause to believe that any other "subjects" were in Respondent's truck at the time of the warrantless search by officer Peters. Respondent contends that if proper and due regard is given to the trial court's opportunity to observe and evaluate Peters' testimony, this finding cannot be held to be clearly erroneous. Inasmuch as

there was no probable cause for believing that another individual was inside the truck, there cannot be said to have been exigent circumstances present to justify the search on that basis.

> "The exigent circumstances allowing immediate [warrantless] search of a movable vehicle is an exception to the Fourth Amendment's warrant requirement. It does not serve to discharge the antecedent necessity of probable cause. Only when there is probable cause to believe that contraband [or in this case another individual presenting danger to the officers] will be found at the time the search occurs, will the exception catalyze permissible investigation of the auto's content without the procurement of a warrant." *People* v *Young*, 89 Mich App 753, 760-761, 282 NW2d 211 (1979), cert den 455 US 927.

In addition to lack of probable cause, it should be pointed out that the trial court specifically found that officer Peters could have looked inside the truck without opening the door to ascertain whether other persons were inside. This statement lends additional support to the court's ruling, and in fact suggests that the intrusion into the vehicle was made for purposes other than those articulated by Petitioner and its witness.

Inasmuch as the trial court's finding was supported both by fact and by law, and inasmuch as Petitioner has not met its burden of justifying the search under a legitimate application of the "plain view" doctrine, the order suppressing the handgun from evidence must stand.

(2) "Search Incident to Arrest"

In their remaining argument, Petitioner seeks to justify the warrantless intrusion into Respondent's truck as a search incident to arrest. As with the "plain view" doctrine, the Petitioner has again failed to meet its legal burden of justifying the search and demonstrating that the trial court's finding was "clearly erroneous".

The leading United States Supreme Court case which established the requirements for a valid, warrantless search incident to arrest is *Chimel* v *California*, 395 US 752, 89 S Ct 2034, 23 L Ed 2d 685 (1969). There police sought to justify a warrantless search of an entire house when defendant was arrested immediately upon entering his home. In rejecting the prosecution's contention that articles were lawfully seized throughout the house and in desk drawers or other closed or concealed areas in the room in which defendant was arrested, the court clearly defined the limitations on a valid search incident to arrest as follows:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officers' safety might be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary item must, of course, be governed by a like rule. A gun on the table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person *and the area 'within his immediate control' — construing that phrase to mean the area*

from within which he might gain possession of a weapon or destructible evidence." 395 US, 762-763 (emphasis supplied).

The question presented to this court, therefore, is whether the trial court was clearly erroneous in finding that the search of the vehicle by officer Peters was not a valid search incident to arrest inasmuch as the vehicle could not be said to have been in the area within Respondent's immediate control.

As correctly observed by the trial court, and as officer Peters testified, at the time of the search Respondent had been arrested and was "secured" or in the custody of other officers at the scene of the arrest. Prior to the search, Respondent had been so secured at a distance of approximately 15 feet from his truck. Respondent's truck could not be deemed to be under his immediate control in such circumstances. As a matter of fact, it is reasonable to assume that the entire area was under the control of the police at the time of Respondent's arrest, inasmuch as 8 officers were present and involved in the incident. As a result, Petitoner's argument does not satisfy the requirements for a valid search incident to arrest under either Michigan or federal law.

Petitioner, however, seeks to justify the search pursuant to the holding of *New York* v *Belton*, 453 US 454, 101 S Ct 2860, 69 L Ed 2d 768 (1981). But the circumstances existing at the time of the search in the present case do not call for application of *Belton*.

In *Belton*, a single state police officer stopped a speeding car containing 4 male occupants. During his initial questioning of the occupants, the officer discovered that none of the men owned the vehicle, observed the smell of burning marijuana coming from the interior of the auto, and obersved an envelope marked "Supergold" on the floor which he associated with marijuana.

The officer, therefore, directed the men to get out of the car, placed them under arrest for possession of marijuana, searched them individually, and searched the interior of the vehicle. During the search of the vehicle, he discovered cocaine in defendant Belton's jacket. Defendant sought to suppress the cocaine as the result of an illegal, warrantless search.

The United States Supreme Court specifically held as follows:

> "* * * when a policeman has made a lawful custodial arrest of an *occupant* of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 US, p 460 (emphasis supplied).

Belton is factually inapplicable, and therefore not controlling here in several important aspects.

Exceptions to the warrant requirement of the Fourth Amendment are to be narrowly construed. *Arkansas* v *Sanders*, 442 US 753, 759-760, 99 S CT 2586, 661 L Ed 2d 235 (1979); *Coolidge* v *New Hampshire, supra*, 403 US, pp 454-455. Each of the few jealously and carefully drawn exceptions to the warrant requirement must be "strictly tied to and justified by the circumstances which rendered its initiation permissible". *Terry* v *Ohio*, 392 US 1, 19, 88 S Ct 1868, 20 L Ed 2d 889 (1968).

The holding in *Belton* is limited to allowing police to search a vehicle when the actual occupant thereof has been validly arrested. In the present case, Respondent was not an occupant of the vehicle when arrested. He was secured and taken into custody 15 feet or so away from the vehicle that was subsequently searched without warrant. The circum-

stances highlight another difference between the present case and *Belton*, to-wit:

> "* * * the 'search' was conducted by a lone police officer who was in the processs of arresting four unknown individuals whom he had stopped in a speeding car owned by none of them and apparently containing an uncertain quantity of a controlled substance. The suspects were standing by the side of the car as the officer gave it a quick search to confirm his suspicions before attempting to transport them to police headquarters * * *." 453 US, p 457.

The factual differrences are obvious. In *Belton*, the 4 occupants of the vehicle were ordered out after a police officer lawfully stopped them and observed drug paraphenalia inside. The officer was outnumbered 4 to one, the 4 occupants were standing beside the vehicle at the time of the search, and one of them could conceivably have reached inside the vehicle. The lone officer would have had to abandon the vehicle to take the suspects to the police station, risking tampering by a passersby.

Respondent here was not an occupant of the vehicle when arrested. He was not in a position where he could have access to the vehicle at the time of the search. The police had complete control of the area of the arrest, including Respondent's vehicle. There was no real or probable cause to suspect that either particular evidence of the crime or another individual was inside the truck. Officer Peters' testimony established quite the contrary.

Clearly, the search here was not tied to and justified by the circumstances then present. Under the mandated narrow contruction of the holding in *Belton*, the search which Petitioner seeks to justify cannot be validated.

CONCLUSION

WHEREFORE, Respondent respectfully requests that this Honorable Court deny the petition for writ of certiorari to review the judgment of the Supreme Court of the State of Michigan.

Respectfully submitted,

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Dated: April 17, 1985

APPENDIX

Testimony of Kermit Peters

STATE OF MICHIGAN
IN THE DISTRICT COURT
FOR THE COUNTY OF OAKLAND

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

-v-

CASE NO. 814070
57280

EARNEST EARLY,
Defendant.

PRELIMINARY EXAMINATION

BEFORE THE HONORABLE Kenneth H. Hempstead, Judge, 51st District Court, Drayton Plains, Michigan, on February 10, 1983.

APPEARANCES:

MR. CRAIG A. WEIER
Appearing on behalf of the People

MR. SANFORD ROSENTHAL
Appearing on behalf of the Defendant

Kristine E. Norlin CER 0670

Testimony of Kermit Peters

(5)

* * *

KERMIT PETERS Called as a witness by the People at about 10:55 a.m., sworn by the Court, testified as follows:

DIRECT EXAMINATION

(6)

BY MR. WEIER:

Q. Would you state your full name for the Record, please?

A. Kermit Peters.

Q. Your occupation?

A. Patrolman City of Pontiac.

Q. How long have you been so employed?

A. Eleven years.

Q. Were you so employed and working in that capacity on August 5, 1981, sir?

A. Yes.

Q. And what were your duties on that date?

A. I was assigned to the Pontiac Surveillance Unit working in conjunction with the Michigan State Police and the FBI.

Q. And in that capacity, did you have occasion to make some surveillance on a certain vehicle during that day?

A. Yes, I did.

Q. And did you see any individual driving that motor vehicle that you were keeping an eye on?

A. Yes, I did.

Q. Did you get a good look at that individual?

A. Yes.

Q. Would you recognize him if you saw him again?

A. Yes.

Q. Is he in the Courtroom today?

A. Yes.

(7)

Q. Would you point him out for the Judge, please?

A. The gentleman in the beige shirt—or beige suit sitting at the defense table.

MR. WEIER: May the Record reflect that the witness has identified the defendant, Earnest Early.

THE COURT: It may.

MR. WEIER: Thank you.

BY MR. WEIER:

Q. Why were you keeping surveillance on Mr. Early, sir?

A. We were involved in a year and a half investigation of an auto parts theft.

Q. A year and a half prior to August 5, 1981, that was a continuing investigation?

A. Yes, sir.

Q. And what, if anything, occurred on August 5, 1981, in the course of that investigation?

A. We began a surveillance at approximately 6 a.m. in the morning at the Ramada Inn in Southfield.

Q. And who were you keeping su. veillance on at that time?

A. Ira Flashner.

Q. What, if anything, did you observe during the course of your surveillance?

A. Somewhere around noon, 12:56, a black pick up operated by Mr. Early arrived aththe Ramada in.

Q. And what, if anything, occurred after his arrival?

(8)

A. Observed Mr. Early and Mr. Flashner together and ultimately Mr. Flashner and Mr. Early left.

Q. All right. And did you have occasion to follow Mr. Flashner and Mr. Early?

A. Yes.

Q. And how did they leave, sir? That area?

A. Mr. Flashner was operating a red van and Mr. Early was operating a vehicle that he came in.

Q. The black pick up truck?

A. Yes.

Q. And where did they go, sir?

A. They ultimately arrived at the Pied Piper Restaurant in Waterford.

Q. Now, pursuant to your investigation of a year and a half prior to this date, did you know what was to transpire at the Pied Piper Restaurant?

A. Yes, there was a sale of parts, auto parts, that Mr. Flashner was under the impression was stolen and the transaction was to take place in the area of Waterford.

* * *

(9)

* * *

Q. Who was the transaction between? The transaction at the Pied Piper?

A. An undercover officer and Mr. Flashner.

Q. And did you, in fact, go the Pied Piper as well?

A. Yes, sir.

Q. And what, if anything, did you observe there, sir?

A. The picke up truck followed the red van. There was a money transaction at the Pied Piper Restaurant parking area.

Q. You saw a money transaction, what do you mean by that, sir?

A. There was a suitcase full of money that was given to the undercover officer.

Q. Who gave it to the undercover officer?

A. Mr. Flashner.

Q. Was Mr. Early present at the time?

A. Yes.

Q. What happened after that?

A. They left the restaurant and ultimately arrived at the Attic Storage Vaults in Waterford.

Q. Would that be at 6535 Highland Road in Waterford, sir?

(10)

A. Yes.

Q. All right. And if you know, what was the purpose of going to that storage vault area?

A. To get the parts that the transaction involved.

Q. The money was for payment of auto parts?

A. Yes.

Q. Those auto parts were allegedly at the Vault Storage facility?

A. Yes.

Q. Who went to the Vault Storage facility?

A. It would be Mr. Flashner, operating the van, and Mr. Early, operating his pick up truck.

Q. And other undercover officers?

A. Yes.

Q. Did you see Mr. Early arrive at the Vault Storage facility?

A. I observed him operate the vehicle and enter into the compound area.

Q. All right. And what, if anything, did you observe after that, sir?

A. The signal was given to converge onto the area.

Q. Who gave that signal?

A. It would have been by the crew leader.

Q. The undercover officer?

A. Yes.

Q. And what was that signal representing, sir?

A. That the parts were being removed from the storage area and (11) placed into the vehicles.

Q. All right. Did you, in fact, go up to the vault storage area where the undercover officer was?

A. Yes.

Q. What did you observe in that area, sir?

A. I observed Officer Colling and—our Strike Force Investigators Colling and Bennel were placing Mr. Flashner and Mr. Early, securing them, by the red van in front of vault number 37.

Q. By securing, do you mean placing them under arrest?

A. Yes.

Q. All right. Did you observe any movement of auto parts prior to that arrest?

A. No, I didn't.

* * *

(12)

* * *

Q. Officer Peters, at the point that Mr. Early was arrested were you able to observe Mr. Early's position with respect to the truck that he arrived in?

A. Yes, he was approximately 15 feet away.

Q. What, if anything, did you do after you observed that apprehension?

A. I was overlooking the area and seeing if there was other individuals, other responsibles, in the area, walked over towards Mr. Early's vehicle.

Q. And what did you do at that point, sir?

A. It was a four-wheel drive vehicle kind of high and I opened the door of the vehicle.

* * *

Q. What, if anything, did you observe upon opening the door of (13) the vehicle, sir?

A. I observed the butt of the handgun.

Q. What was your position upon that observation? Were you inside the vehicle?

A. I had the door open and I was between the door and the seat area. It would be the driver's door.

Q. And where did you observe the butt of the handgun?

A. Under—protruding from underneath the front seat area.

Q. Was it on the floor of the vehicle?

A. Yes.

Q. And when you observed it, did you recognize it immediately as the butt of a handgun?

A. Yes.

Q. What, if anything, did you do when you observed that, sir?

A. I observed it. There was a rag covering the cylinder and barrel area, removed the handgun.

Q. What, if anything, did you do with the handgun after you removed it?

A. I maintained control of it.

Q. By that, what do you mean, sir?

A. Maintained control and placed it on a property tag and it was placed ultimately in a locked evidence closet.

Q. Did you obtain that piece of property for the proceedings today?

A. Yes, I did.

(14)

Q. Do you have it with you today?

A. Yes.

MR. WEIER: May I have this marked as People's Proposed Exhibit Number One, please?

* * *

Q. Mr. Peters, I am now handing you what has been marked as People's Proposed Exhibit Number One. I wonder if you can identify that for the Court, please?

A. Yes, it has my name on it and the property tag number that was assigned to the handgun..

Q. Specifically, what is it that's marked People's Proposed Exhibit Number One?

A. It's a Smith and Wesson six-shot nickel plated pistol.

Q. The marking is on an envelope, is it not? A manilla envelope?

A. Yes.

Q. Did you place the weapon in the envelope?

A. Yes.

(15)

Q. And is the weapon in—you've removed the weapon from the envelope at this point, correct?

A. Yes.

Q. Is the weapon in the same condition today as it was when you first obtained it?

A. Yes, it is.

Q. Is that the weapon you obtained from Mr. Early's—or the vehicle that you observed Mr. Early driving?

A. Yes, and it has my initials on it and the date.

Q. What, if anything, did you do after you discovered the weapon?

A. It was placed on this property tag number and placed in a locked evidence area.

Q. If you could with greater specificity, sir, tell the Court exactly where that weapon was when you first observed it.

A. The driver's—or the seat in the pick up truck is a bench seat area, bench seat, the handgun was underneath where the driver would sit, if his legs were placed on the floor, it would be approximately between the legs, both legs. The front seat—or the seat angles down a little bit. It's not straight up and down, it angles, towards the rear a little bit and it would be approximately maybe five to six—maybe eight inches or so from where the door would be if the door was closed, underneath the seat, and it would be the angle that it comes down, I was able to see the butt of the handgun.

(16)

Q. Sir, had you been in the proper position, would you have been able to observe the butt of the handgun without opening the door of the truck?

A. It's possible, but it would be a contorted position.

* * *

Q. Did you examine the gun when you obtained the gun?

A. Yes.

Q. Was the gun loaded or unloaded?

A. It was loaded.

Q. How many rounds if you recall?

A. As I recall, I believe, there was four live rounds.

* * *

(19)

* * *

CROSS EXAMINATION

BY MR. ROSENTHAL:

Q. Officer Peters, I believe you've stated that you'd seen Mr. Early driving the pick up truck in question. I won't reiterate the description, but I think it was a black one. But you'd seen him driving that, am I correct, sir?

A. Yes, sir.

Q. And you'd also seen a Mr. Flashner?

A. Yes.

Q. Driving a red van, am I correct, sir?

A. Yes.

Q. And this was in at least a couple of instances. One was prior to stopping at the coffee shop or restaurant you've named and then subsequent to that, at the area where the storage bin, I think you've called it, was located, is that correct, sir?

A. Yes.

Q. And you had a view of one person in each vehicle, is that right?

A. Yes, sir.

Q. Is it true, sir, that the reason that you opened the door and looked in the vehicle was to see if there were other people in there in Mr. Early's vehicle?

(20)

A. Yes, sir.

Q. And you were not looking for anything else at that time, if I understand your report correctly, is that right? You were looking for other subjects?

A. It was based on concern for my safety and the safety of the other officers.

Q. But you were looking for someone, right? Assuming there were—you were assuming there might be someone in the vehicle, is that right?

A. Yes, sir.

Q. All right. And yet you had seen the vehicle, it had been under surveillance, and the only one you had seen in the vehicle was Mr. Early, is that correct?

A. Yes, sir.

Q. Mr. Peters—Officer Peters, the weapon that you have described, was this covered by anything?

A. Partly covered, yes, sir.

Q. By what, sir?

A. I believe it was a red rag.

Q. Okay. And what portion of the weapon was under the seat if you recall?

A. The—it would be from the cylinder area to the barrel.

Q. So, that would make up well over two-thirds of it, would it not, sir? From the cylinder forward to the end of the barrel?

(21)

A. Yes, approximately.

Q. All right.

* * *

(24)

* * *

Q. Mr. Peters, you stated on your direct testimony that you had observed the vehicle with Mr. Early in it, is that correct?

(25)

A. Yes, sir.

Q. And he was the only one you saw in it, is that correct, sir?

A. Yes, sir.

Q. And you saw, as I've stated earlier, on more than one occasion you saw him at the stop prior to the coffee shop and then after the coffee shop—

A. Yes.

Q. —on the way to this bin? And was he the only individual in there at the time that you saw?

A. He was the only individual that I saw.

* * *

(26)

* * *

Q. Mr. Peters, you are aware, are you not, that subsequently you and members of the Federal Bureau of Investigation interviewed Mr. Early, am I correct, in length?

A. Yes, I personally didn't view him. They interviewed him. I processed him through Pontiac ultimately.

Q. Well, you also at a later date interviewed him along with the FBI, did you not?

A. With you, sir?

Q. Yes.

A. Yes.

* * *

(27)

* * *

Q. It's a fact, is it not, you could have looked into the vehicle without opening the door to see if there was a human being in there?

(28)

A. It's—yes.

* * *

REDIRECT EXAMINATION

MR. MR. WEIER:

Q. Officer Peters, what period of time elapsed between the time that you saw the defendant drive into the Vault Storage area and the time of the defendant's apprehension if you can recall?

A. Approximately three to five minutes.

Q. How many other individuals were in the area of the Vault Storage area where the defendant was apprehended? All together?

(29)

A. Including police officers?

Q. Yes.

A. Approximately ten.

Q. How many of those ten were police officers?

A. Would have been probably eight.

* * *